No. 87-1379

IN THE

# Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
*Petitioners*,

v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,
*Respondents*.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION

Kate Martin
Janlori Goldman
Hope Nakamura
American Civil Liberties Union
Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5388

John A. Powell
(Counsel of Record)
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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## INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of civil rights and civil liberties. The ACLU has a long history in promoting freedom of information through legislation and litigation. The ACLU also has a strong interest in protecting privacy rights and has testified before Congress concerning the threats posed by the FBI's compilation of name-indexed criminal records.

This case involves a conflict between the right of privacy and the right to open government. As recognized by Congress in the privacy exemptions of the Freedom of Information Act (FOIA), the resolution of that conflict calls for careful balancing. The court below refused to engage in such

balancing. Because we believe that approach was misguided, we respectfully submit this brief as amicus curiae.[1/]

**SUMMARY OF ARGUMENT**

The central purpose of the Freedom of Information Act (FOIA)[2/] is to "ensure an informed citizenry, vital to the functioning of a democratic society . . . ." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Agency records must be disclosed unless they come within specific exemptions of the Act that are to

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1/ Counsel for petitioners and respondents have consented to the filing of this brief. Their letters have been filed with the Clerk pursuant to Rule 36.2 of the Rules of this Court.

2/ 5 U.S.C. § 552 (1982) as amended by the Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Title I, Subtitle N, Sections 1801-1804, 100 Stat.3207-48 (1986).



be narrowly construed. United States Department of Justice v. Julian, 56 U.S.L.W. 4403, 4404 (1988). Thus the inquiry is usually whether the requested information is within a category of material that the agency may choose to, but need not, withhold.

The privacy exemptions, 6 and 7(C), are different. They are designed to protect information in the hands of the government, the release of which may invade an individual's privacy. These exemptions pose the classic conflict between the importance of the public's need to know about the workings of government and the world at large in order to be able to govern itself effectively, and an individual's right to be free of unnecessary intrusion into his or her private affairs. In enacting the Freedom of Information Act, Congress

recognized that these two competing rights could only be reconciled by balancing the competing interests involved in each specific case. Only the courts, not the legislature can weigh the balance in each individual circumstance.

The court below acknowledged the balancing requirement in theory but disregarded it in practice. Instead, it initially looked at a single factor--state law on disclosure of criminal history records. When that approach proved unworkable, the court turned to whether the information was a matter of "public record." The Court of Appeals refused to acknowledge the long-recognized privacy interest in criminal history records and the harm which can flow from disclosure of such records, even though they are a matter of public record, or the important public interests



that may be promoted by disclosure of such records.[3/]

## ARGUMENT

### I. THE PRIVACY INTEREST ANALYSIS APPLIED BY THE COURT OF APPEALS WAS INCORRECT

The Court of Appeals held that whether there was a privacy interest in criminal history records depended only upon whether the information was a matter of public record. Reporters Committee for Freedom of the Press v. United States Department of Justice, 816 F.2d 730, 740 (D.C. Cir. 1987) [hereinafter Reporters Committee I]; Reporters Committee for Freedom of the Press v. Justice, 831 F.2d 1124, 1127 (D.C. Cir.

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3/ The American Civil Liberties Union takes no position on whether the individual records at issue in this case should be disclosed. It submits this brief as amicus curiae simply to point out that the Court of Appeals incorrectly interpreted the FOIA in determining this issue.

1987) [hereinafter Reporters Committee II]. Because of this truncated analysis, it failed to properly consider what privacy interests may be harmed by disclosure of the records.

Determining the strength of the privacy interests in criminal history records in a particular case requires consideration of other factors in addition to whether the information was a matter of public record. Such factors include the potential harm caused by disclosure, the accuracy, completeness and age of the record, and the nature of the record itself. For instance, privacy rights in criminal history records may be viewed on a spectrum that accords arrest-only records the greatest confidentiality protection and conviction records a lesser degree of protection.



The court below ignored the long-recognized privacy interest in these records, and limited its inquiry to whether criminal history records are made available in some form, at some time, at the state level. This standard is inappropriate when applied to the wholly different character of federal criminal history records systems.

### A. An Individual's Right to Privacy Extends to Criminal History Records Even Though the Information Contained in the Records Was Once Publicly Available.

The elaborate criminal history records system maintained by the FBI, cumulative and name-indexed, is more than just a collection of state criminal history records, which, as original records of entry, are only stored chronologically. The FBI's organization, indexing, and centralization of its records system transforms the raw data received from the state record repositories into a

completely different product. The possible intrusiveness of a search through a computerized, name-indexed database is far greater than that which can result from a search of the original records of entry. The corresponding harm to an individual is therefore greater as well.

State statutes acknowledge that, to protect privacy, differing standards of access are needed for different kinds of record systems. These standards would be eviscerated if record requesters could receive any and all records from the FBI's central repository:

> . . . [t]here is a great disparity among present state laws and policies regarding noncriminal justice access and use. Laws and policies on dissemination range from those in a few states that essentially do not permit access to any criminal history records for any noncriminal justice purpose to those of a few 'open records' states that permit access to all or most of such records for anyone for any purpose. Between these extremes is an almost bewildering variety of statutory approaches . . . .4/



All but two states distinguish between original records of entry and cumulative, name-indexed criminal history records, and restrict the public's access to the more sophisticated records system.5/ These restrictive dissemination laws reflect the states' recognition that cumulative, name-indexed criminal history records are entitled to a greater degree of protection.

In an earlier FOIA case, the Supreme Court noted that the mere fact that a record, including a past criminal conviction, "is a matter of public record

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4/ SEARCH Group, Inc., A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of III for Noncriminal Justice Purposes (1984) at 4.

5/ The two states that do not make this distinction are Florida and Wisconsin. Fla. Stat. Ann. § 119.07, 943.053; Wis. Stat. Ann. § 19.35.

somewhere in the Nation cannot be decisive" in determining whether the information in the record is private. Department of State v. Washington Post Co., 456 U.S. 595, 603 n.5 (1982).

As Judge Starr similarly recognized in his dissent below:

> Computerized databanks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves. This conclusion is buttressed by what I now know to be the host of state laws requiring that cumulative, indexed criminal history information be kept confidential, as well as by general Congressional indications of concern about the privacy implications of computerized data banks.

Reporters Committee II, 831 F.2d at 1128.

Judge Starr noted that if the majority opinion is upheld and carried to its logical extreme,

> the federal government is thereby transformed in one fell swoop into the clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose . . . . [T]his new-fangled regime will have a pernicious effect on personal privacy interests in conflict with Congress' express will.

Id. at 1130.

In other contexts, this Court has recognized the enhanced danger to personal privacy posed by computerized databanks containing personal, sensitive information:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized databanks and other massive government files . . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

Whalen v. Roe, 429 U.S. 589, 605 (1977). As Justice Brennan observed, the centralized storage of computerized data "vastly increases the potential for abuse of that information . . . ." Id. at 606 (Brennan, J., concurring).

## B. Disclosure of Criminal History Records May Result in Serious Harm to Individuals.

### 1. The criminal history records maintained by the FBI are often incomplete and inaccurate.

The quality of the FBI's criminal history records is poor, exacerbating the intrusion into personal privacy and the stigma resulting from release of these records to the public. Fifty percent of the FBI's criminal history records are incomplete because they lack dispositions[6/], and twenty percent contain inaccurate information.[7/] Allowing public release of stigmatizing information that is unreliable, incomplete,

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6/ FBI Oversight and Authorization Request for Fiscal Year 1988: Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 100th Cong., 1st Sess., 184 (1987).

7/ U.S. Congress, Office of Technology Assessment, Alternatives for a National Computerized Criminal History System 91 (1982).



or clearly inaccurate, inflicts substantial and unjust injury on individuals. The potential for harm is staggering given that between one-fourth and one-third of the total work force has a criminal history record.[8/]

The D.C. Circuit required the FBI to maintain accurate records in Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974), ruling that "dissemination of inaccurate criminal information without the precaution of reasonable efforts to forestall inaccuracy restricts the subject's liberty without any procedural safeguards designed to prevent such inaccuracies." Id. at 1123. The Tarlton court held that the FBI cannot paint itself as just the "passive recipient"

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8/ Bureau of Justice Statistics State Criminal Records Repositories 1 (1985); SEARCH Group, Inc., Criminal Justice Information Policy: Privacy and the Private Employer 7 (1981).

of records from state and local agencies. Id. at 1126.

**2. Disclosure of arrest records will have a disproportionate impact on racial minorities**

The dissemination of arrest records to the public will perpetuate discrimination against racial minorities in employment and licensing determinations. Blacks are arrested four times more frequently than whites, even though nearly half of those arrests do not end in conviction. In 1980, Blacks accounted for about twenty-nine percent of all records in the FBI's files, nearly triple the percentage of Blacks in this country.9/

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9/ U.S. Congress, Office of Technology Assessment, Alternatives for a National Computerized Criminal History System 141 (1982). See also, J. Petersilia, Racial Disparities in the Criminal Justice System (1983); Smith, Visher & Davidson, "Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions", 75 J. Crim. L. & Criminology 234-49 (1984).



Courts have recognized the "considerable obstacles which an arrest record poses to an individual's pursuit of happiness and enjoyment of freedom and liberty, and the particularly heavy toll which such records have had on minorities . . . ."10/ In Gregory v. Litton Systems, 316 F.Supp. 401 (C.D. Cal. 1970), modified on other grounds, and aff'd as modified, 472 F.2d 631 (9th Cir. 1972), a federal district court held that non-conviction data is not relevant to an applicant's employment, finding that a policy of refusing employment to Blacks solely on the basis of arrest records has a racially discriminatory impact because Blacks are "arrested substantially more frequently than whites in proportion to their numbers." Id. at 402-03. See also

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10/ Utz v. Cullinane, 520 F.2d 467, 491 (D.C. Cir. 1975).

Green v. Missouri Pacific R.R., 523 F.2d 1290 (8th Cir. 1975) (individuals may not be denied employment on the basis of convictions that do not significantly bear upon the particular job requirements).

### 3. Courts recognize that disclosure of criminal history records may result in serious harm to individuals

A variety of harms to individual privacy may result from disclosure of criminal history record, including the individual's right to be presumed innocent until proven guilty, damage to one's reputation caused by the release of an arrest record, the stigmatizing effect of a criminal history record, and the lack of probative value or relevance of an arrest record.

This Court has acknowledged the tangible harms resulting from the release of criminal history records, particularly records of arrest that do not end in conviction.



Michelson v. United States, 335 U.S. 469 (1948). In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the Court held that one may not be denied admission to the bar based on an arrest record:

> The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct . . . . When formal charges are not filed . . . whatever probative force the arrest may have had is normally dissipated.

Id. at 241.

Even in Paul v. Davis, 424 U.S. 693 (1976), which held that there is no consitutional protection against disclosure of the fact of arrest, the Court recognized the potential harm flowing from disclosure of an arrest record, and the right to recover for such harm in some circumstances. Id. at 701. Justice Brennan cautioned against misinterpreting the majority opinion to undermine the many federal and state

court cases "relying on the privacy notions and presumption of innocence" that place "substantive limits on the power of government to disseminate unresolved arrest records outside the law enforcement system." Id. at 735 n.18 (Brennan, J., dissenting).

Lower courts have recognized that "opportunities for schooling, employment or professional licenses may be restricted or nonexistent..." as a consequence of the dissemination of arrest records. Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970). See also State v. Pinkney, 33 Ohio Misc. 183, 290 N.E.2d. 923 (1972). In Doe v. Webster, 606 F.2d 1226, 1245 (D.C. Cir. 1979), the D.C. Circuit held that release of a set-aside conviction record would result in "economic, social and legal consequences which impair . . . reintegration into society." Based on this evidence of harm,



the court ruled that the right to privacy encompasses:

> a substantial measure of freedom for the individual to choose the extent to which the government could divulge criminal information about him [or her], at least where no conviction has ensued and no countervailing government interest is demonstrated.

Id. at 1238 n.49 (quoting Utz. v. Cullinane, 520 F.2d 467, 482 n.41 (D.C. Cir. 1975)).

In Utz v. Cullinane, the same court could not "divine any interest--whether compelling or merely rational--that the government must have in dissemination" of arrest records outside the criminal justice community, finding such dissemination inconsistent with privacy and due process rights:

> For the government to disseminate an arrest record pertaining to the allegedly criminal episode, when it knows that employees may infer that the individual was guilty rather than innocent of the crime, effectively permits the government to inflict punishment despite the fact

that guilt was not constitutionally established.

Id. at 481.

Not only has access to criminal history records been restricted, but in some instances, courts have ordered that records be destroyed to protect privacy interests. Natwig v. Webster, 562 F.Supp. 225 (D.R.I. 1983) (ordering expungement of a fifteen year-old arrest record).

**4. Congress and the executive branch recognize that disclosure of criminal history records may result in serious harm to individuals**

The FBI maintains a central repository of local, state, and federal criminal history records and provides these records to law enforcement agencies nationwide. In recognition of the substantial harm to privacy interests that can result from disclosure of these records, federal legislation restricts disclosure of criminal



history records maintained by the FBI. Congress authorizes the release of criminal history records to non-law enforcement officials on a limited basis and only where specifically authorized by federal or state statute.11/

Moreover, the Executive Branch has implemented procedures to protect against unsupported inferences by employers based upon incomplete arrest records that may lead to the unfair denial of employment opportunities. Since 1974, the FBI has

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11/ Congress has authorized the FBI to disclose criminal history records only to certain industries including: portions of the securities industry, Securities Acts Amendments of 1975, 15 U.S.C. § 78q (1982); the commodities industry, Futures Trading Act of 1982, 7 U.S.C. § 21 (1982); the nuclear power industry, Omnibus Diplomatic and Antiterrorism Act of 1986 § 606, 42 U.S.C.A. § 2169 (West Supp. 1987); federally chartered or insured banks, Department of State Appropriations Act, Pub. L. No. 92-544, 86 Stat. 1109 (1973); and state and local government officials where mandated by state statute, id.

operated under a regulation known as the "one-year rule," which prohibits dissemination of arrest records older than one year which lack disposition data even to the limited, authorized non-law enforcement requesters.[12/] The underlying privacy interests protected by the one-year rule have been explicitly recognized by the FBI.[13/]

## II. THE PUBLIC INTEREST ANALYSIS APPLIED BY THE COURT OF APPEALS WAS ALSO INCORRECT.

The Court of Appeals held that the public interest in disclosure of any and all information sought under the Freedom of Information Act is always the same. Based

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12/ 28 C.F.R. § 50.12 (1974). See also 28 C.F.R. § 20.33 (1974).

13/ See Joint Appendix at 66, affidavit of C. Kenneth Arnold, Section Chief of the Recording and Posting Sections, Identification Division, FBI.



on its desire to avoid the "awkwardness of the federal judiciary appraising the public interest in the release of government records," Reporters Committee I, 816 F.2d at 740-41,[14/] the majority held that the "public interest" to be considered under Exemptions 6 and 7(C) of the Act "means [nothing] more or less than the general disclosure policies of the statute," Reporters Committee II, 831 F.2d at 1126. The court's refusal to consider the public interest in disclosure in relation to the

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14/ Initially the court held that the public interest in the FBI's disclosure of state records depended upon the originating state's determination of whether such disclosures are in the public interest. 816 F.2d at 741. On rehearing, the court abandoned this approach because the different and conflicting state policies concerning disclosure of arrest records would make it "confusing and indeed unworkable" to use state policies as a benchmark of the public interest in disclosure of the records. Reporters Committee II, 831 F.2d at 1125.

particular information at issue is contrary to both the text of the FOIA and court decisions interpreting the statute. The public interest in disclosure of information, the release of which would contribute to public debate or understanding of an issue of public concern, is much greater than the public interest in disclosure of, for example, the private details concerning individuals which are contained in government records.

By disregarding even the possibility of such distinctions, the court below ignored the unique place that the privacy exemptions hold in the statutory scheme. No other exemptions refer to or call for a balancing of interests after it is determined that the requested information is exempt.15/ The

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15/ In the other exemptions Congress struck the balance against disclosure and the courts' duty is limited to determining



only role assigned to the judiciary under the other exemptions is to determine whether the requested information comes within the exemption. Exemptions 6 and 7(C) call for further judicial inquiry. Under Exemption 6, records can be withheld only if their disclosure "would constitute a clearly unwarranted invasion of personal privacy," and under Exemption 7(C), only to the extent that production of the records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552 (1982), as amended by Freedom of Information Reform Act of 1986, Pub. L. No. 99-570 § 1801-1804, 100 Stat. 3207-48 (1986). Thus, the statute requires the courts to decide whether disclosure of the

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whether the material is within the defined category of exemption. Lesar v. United States Department of Justice, 636 F.2d 472, 486 n.80 (D.C. Cir. 1980).

information constitutes an invasion of privacy and whether such invasion is warranted.

In determining whether the harm to the privacy interests is warranted, the courts must necessarily consider the public interest in disclosure of the particular information requested. The statute directs the courts to engage in a balancing test; it nowhere limits what they should consider in doing so.

In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) this Court explained that the statutory language requires a determination of whether disclosure of information would constitute "an unwarranted invasion" on a case by case basis. Specifically, Robbins addresses the distinction between exemptions 7(A) and 7(C):



> There is a readily apparent difference between subdivision (A) [of Exemption 7] and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases--'a person,' 'an unwarranted invasion,' 'a confidential source'--and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

437 U.S. at 223-24.

The legislative history of the FOIA confirms that Congress expected the courts to evaluate the public interest in the specific information sought. As Congress recognized, the privacy exemptions "involve a balancing of the interests between the protection of an individual's private affairs from unnecessary public scrutiny and the preservation of the public's right to government information." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); see also

H.R. Rep. No. 1497, 89th Cong. 2d Sess. 11 (1966).

The Court of Appeals erred in assuming that because Congress did not set out a standard against which to judge the public interest in disclosure, Congress intended the courts to give "public interest" a static weight in the balancing process. As the Senate Committee Report noted, "[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

The privacy exemptions must also be viewed in light of prior decisions in the area that have been left unchanged by Congress. See Reed v. Steamship Yaka, 373 U.S. 410, 414-15 (1963). For almost two decades, the courts have consistently assessed the public interest value of the



specific information requested in reviewing privacy exemption cases. See, e.g., Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Cochran v. United States, 770 F.2d 949 (11th Cir. 1985); Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984) (Exemption 7(C) balancing test must be applied to the specific facts of each case); Ferri v. Bell, 645 F.2d 1213 (3rd Cir. 1981); Baez v. Department of Justice, 647 F.2d 1328 (D.C. Cir. 1980); Columbia Packing Co., v. USDA, 563 F.2d 495 (1st Cir. 1977). It is significant that this consistent interpretation has not been altered by Congress despite other amendments to the FOIA reversing court decisions.

Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), which analyzed the public interest of the particular information requested, was decided before Congress passed the 1974 FOIA amendments. Following extensive hearings

and a comprehensive committee report, Congress made a number of procedural changes and amended Exemptions 1 and 7[16/] to reverse judicial interpretations allowing agencies to withhold more information than Congress intended. Freedom of Information Act, Pub. L. 93-502, 88 Stat. 1561 (1974). However, Congress did not instruct the courts to apply a different approach in balancing the public interest in disclosure under the privacy exemptions. See Lesar v. Department of Justice, 636 F.2d 472 (D.C. Cir. 1980).

Although it is possible that Congress was unaware of the courts' application of the public interest standard in 1974, by 1986 the fact-specific approach utilized in Getman was widely employed. See cases cited

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16/ The 1974 amendments added Exemption 7(C) to make clear that the protections in Exemption 6 also apply to law enforcement records. 120 Cong. Rec. S17033 (daily ed. 1974) (statement of Sen. Hart).



supra 29. Yet, in 1986 Congress again considered various amendments to the FOIA and went so far as to amend Exemption 7(C) without attempting to change the balancing test in privacy cases.[17/] This is persuasive evidence that Congress agrees with the approach utilized by the appellate courts. See Missouri v. Ross, 299 U.S. 72 (1936); see also Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 488 (1986).

The Court has also approved such an approach. In Department of State v. Washington Post Co., 456 U.S. 595 (1982) (concerning the applicability of Exemption 6 to records pertaining to the citizenship of certain Iranian officials), this Court directed the lower court to look at the

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17/ Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Title I, Subtitle N, Section 1801-1804, 100 Stat. 3207-48 (1986).

complete factual picture in balancing the competing interests. The Court nowhere indicated that such examination was to be limited to the privacy side of the equation. "The public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a clearly unwarranted invasion of personal privacy . . . ." 456 U.S. at 603 n.5 (emphasis added).

The court below ignored both the statute and settled precedent. The cases cited by the court for the proposition that the FOIA generally does not differentiate based on the purposes for which information is requested, do not support its misinterpretation. It is a non sequitur to argue, as the court below does, that the statements in FBI v. Abramson, 456 U.S. 615



(1982) and NLRB v. Sears, 421 U.S. 132 (1975) mean that the public interest to be weighed under exemptions 6 and 7(C) is the same for all information.18/

In addition, the recent decision in United States Department of Justice v. Julian, 56 U.S.L.W. 4403 (1988), calls into question these statements in Abramson and Sears. The Court in Julian held that, under Exemption 5, different classes of requesters may have different rights to disclosure of information. The Court reasoned that simply because the statute refers to the right of "any person" to receive information, it does not mean that under no circumstances does the statute recognize differences based on

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18/ The statements in Abramson and Sears were not made in the context of addressing the issue of what should be considered in conducting the required balancing test under exemptions 6 and 7(C). Reporters Committee I, 816 F.2d at 746.

the identity of the person seeking disclosure. 56 U.S.L.W. at 4406.

The expressed concern of the court below about the capability of courts to make an individualized determination of the public interest is also contradicted by prior cases. For example, in Department of the Air Force v. Rose, 425 U.S. 352 (1976), the Court considered the application of Exemptions 2 (internal agency rule exemption) and 6 to summaries of disciplinary proceedings against cadets at the Air Force Academy. The Court analyzed both the public interest in disclosure of the summaries and the harm which might flow from their disclosure.19/ Although the

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19/ The Court noted the significant privacy concerns implicated by disclosure of the disciplinary records, although such records typically contain less harmful information than do criminal history records.



Court's weighing of the public interest occurs in the context of its discussion of Exemption 2 rather than Exemption 6, it nowhere limited the applicability of the analysis to Exemption 2. In all events, the case demonstrates that courts can conduct precisely the kind of analysis the court below rejected.

Moreover, the courts have based their analyses on objective considerations. For example, in Department of the Air Force v. Rose, the Court considered the existence of press accounts concerning the matter, the importance of the military and of fair disciplinary proceedings and the relation between the information sought and the stated purpose of the Act to inform the public about governmental action.20/

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20/ In Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984), the court considered the level of responsibility held by the federal

In short, the attempt by the court below to avoid an individual determination of the public interest involved in disclosure of particular information ignores the statute and the cases. The lower court attempted to substitute its judgment concerning the role the judiciary should play in enforcing the FOIA for the legislative determination that has already been made.

## III. BOTH THE PRIVACY INTEREST AND THE PUBLIC INTEREST IN DISCLOSURE OF CRIMINAL HISTORY RECORDS DEPEND UPON A VARIETY OF FACTORS IN EACH PARTICULAR CASE

Because criminal history records are records of official government actions, there is a public interest in their

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employee, as well as the activity for which the employee was censured, in determining the extent of the public interest in the disclosure of the names of FBI agents alleged to be involved in criminal wrongdoing.



disclosure. The extent of the public interest in disclosure of any particular record will depend upon all of the circumstances, just as the degree to which disclosure will invade a privacy interest also varies with the circumstances.

> Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, per se rules of nondisclosure based upon the type of document requested, the type of individual involved or the type of activity inquired into, are generally disfavored.

Stern v. FBI, 737 F.2d at 91.

The interests will vary with the type of information requested.[21/] Generally

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21/ Although information relating to the core purpose of the Act--the right of persons to know about the functioning of the government--is obviously of great public interest, the public's interest is not limited to disclosure of information directly concerning the functioning of the government. Rather, there is a broader interest in having a well-informed electorate. Ditlow v. Shultz, 517 F.2d 166, 172 (D.C. Cir. 1975).

speaking, there is a greater public interest in disclosure of conviction records than of arrest records. Conviction records are more probative and informative than arrest records, which indicate very little about the person arrested. Conversely, there is a greater privacy interest in arrest records. Yet, there may be some circumstances in which the public interest warrants disclosure of an individual's arrest record.[22/]

The degree of the public interest may also depend upon the subject of the request.

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22/ In Ferri v. Bell, 645 F.2d 1213 (3rd Cir. 1981), the court granted a prisoner access to a prosecution witness' arrest record to show that a criminal charge was dropped against the witness in exchange for his testimony. The prisoner was entitled to a new trial if such information was improperly withheld from him. The Third Circuit held such an invasion of privacy to be warranted given the substantial public interest in ensuring the fair administration of criminal justice.



As Judge Starr pointed out below:

> Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest--one that overcomes the substantial privacy interest at stake--in the rap sheet of a public figure or an official holding high government office.

Reporters Committee II, 831 F.2d at 1129.

In addition, the extent of the privacy interest may depend upon whether the information is already widely known. Furthermore, the age of the records may be a factor in determining both the privacy interest and the public interest.[23/] Finally, the purpose for which the records

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23/ Constitutional values and federal and state statutory policies on disclosure or confidentiality are also indications of the public and privacy interests involved. See, e.g., Washington Post Co. v. Department of HHS, 690 F.2d 252, 263, 265 (D.C. Cir. 1982).

are sought may heighten the degree of public interest in disclosure. For example, the public interest in disclosure may be greater where a requester seeks records to examine governmental action than where a requester seeks the same information for purely commercial purposes. See Wine Hobby U.S.A, Inc. v. I.R.S., 502 F.2d 133 (3d Cir. 1974); c.f. Julian, 56 U.S.L.W. at 4406.

## CONCLUSION

The requirement in Exemptions 6 and 7(C) of the FOIA to balance the public interest in disclosure against the privacy interest mandates consideration of all factors on an individualized basis. For the reasons stated herein, this Court should vacate the decision below and direct the district court



to apply the balancing test mandated by Exemptions 6 and 7(C) of the FOIA.

Respectfully submitted,

Kate Martin
Janlori Goldman
Hope Nakamura
American Civil Liberties
Union Foundation
122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-5388

John A. Powell
(Counsel of Record)
American Civil Liberties
Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

Attorneys for Amicus Curiae